Service Date: June 30, 1998

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

IN THE MATTER OF the Application of TOUCH AMERICA and U S WEST Communications, Inc. Pursuant to Section 252(e) of the Telecommunications Act of 1996 for Approval of their Interconnection Agreement.	))))))	UTILITY DIVISION DOCKET NO. D98.5.97 ORDER NO. 6075

ORDER APPROVING INTERCONNECTION AGREEMENT

I. Introduction and Procedural Background

On February 8, 1996, the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (the "1996 Act") was signed into law, ushering in a sweeping reform of the telecommunications industry that is intended to bring competition to the local exchange telecommunications market. The 1996 Act requires companies like U S WEST Communications, Inc. (U S WEST) to negotiate agreements with new competitive entrants in their local exchange markets. 47 U.S.C. §§ 251(c) and 252(a).

U S WEST and Touch America negotiated an interconnection contract after Touch America requested contract negotiations. The agreement is entitled "Interconnection Agreement Between U S WEST Communications, Inc. and Touch America for Montana" (Agreement).

U S WEST submitted the Agreement to the Montana Public Service Commission (Commission) for approval on May 6, 1998. The parties' Agreement was reached through voluntary negotiations and requires Commission approval prior to implementation pursuant to 47 U.S.C. § 252(e). The Commission must approve or reject the Agreement no later than

August 4, 1998, 90 days following the request for approval, or it will be deemed approved. 47 U.S.C. § 252(e)(4).

On May 11, 1998, the Commission issued a Notice of Application and Notice of Opportunity to Intervene and Comment. The Notice established May 20, 1998 as the deadline for intervention and limited intervenors to addressing the grounds for Commission action identified in § 252(e)(2)(A) of the Act. The Notice stated that no public hearing was contemplated by the Commission unless requested by an interested party by May 20, 1998. The Notice further stated that comments were required to be filed no later than June 5, 1998. The Commission's public notice also advised interested parties in the geographic areas affected by the Agreement that intervention in the proceeding was limited and that Montana Consumer Counsel (MCC) could be contacted to represent consumer interests.

Upon review of the Agreement, the Commission makes the following findings, conclusions and order.

II. Applicable Law and Commission Decision

1. The Interconnection Agreement between U S WEST and Touch America provides for, *inter alia*, interconnection by means of collocation, entrance facilities or meet point arrangements; the exchange of traffic between U S WEST and Touch America; compensation for transport and termination of such traffic; the use of interim and permanent Number Portability; the purchase of U S WEST's retail services for resale; the acquisition of unbundled network elements from U S WEST; Touch America customer access to operator assistance, Directory Assistance and E911 service; access to poles, conduits and rights-of-way; access to operational

support systems and myriad other arrangements necessary for Touch America's provision of competitive local exchange services.

2. The Commission must approve or reject the parties' agreement, with written findings as to any deficiencies, no later than August 4, 1998. 47 U.S.C. § 252(e)(1) and (4). Section 252(e)(2)(A) limits the grounds for rejection of an agreement reached by voluntary negotiation:

> (2) GROUNDS FOR REJECTION - The State commission may only reject--
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> (A) an agreement (or any portion thereof) adopted by negotiation under [47 U.S.C. § 252(A)] if it finds that:
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> (i) the agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or
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> (ii) the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity.

3. Notwithstanding the limited grounds for rejection in 47 U.S.C. § 252(e)(2)(A), the state commission's authority is preserved in § 252(e)(3) to establish or enforce other requirements of state law in its review of arbitrated or negotiated agreements, including requiring compliance with state telecommunications service quality standards or requirements. Such compliance is subject to § 253 of the 1996 Act which does not permit states to permit or impose any statutes, regulations, or legal requirements that prohibit or have the effect of prohibiting market entry.

4. Unlike an agreement reached by arbitration, a voluntarily negotiated agreement need not comply with standards set forth in Section 251(b) and (c). Significantly, standards set forth in § 251(c) and which this agreement may have been negotiated "without regard to" include the following:

> (c) ADDITIONAL OBLIGATIONS OF INCUMBENT LOCAL EXCHANGE CARRIERS. --In addition to the duties contained in subsection (b), each incumbent local exchange carrier has the following duties:
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> (2) INTERCONNECTION.--The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network--
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> (A) for the transmission and routing of telephone exchange service and exchange access;
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> (B) at any technically feasible point within the carriers' network;
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> (C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate or any other party to which the carrier provides interconnection; and
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> (D) on rates, terms and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and section 252.

47 U.S.C. § 251(c). This section and § 252(a)(1) of the Act permit parties to agree to rates, terms and conditions for interconnection that may not be deemed just, reasonable and nondiscriminatory, and which are not determined according to the pricing standards included in § 252(c) of the Act, as would be required in the case of arbitrated rates set by the Commission. By approving the Agreement, the Commission does not intend to imply that it approves of all the terms and conditions included in the Agreement and makes no findings herein on the appropriateness of many of the terms and conditions. Our interpretation of the 1996 Act is that §§ 252(a) and (c) prevent the Commission from addressing such issues in this proceeding.

5. When parties execute an interconnection agreement and one or both parties submit it to the Commission for approval, the Commission must approve or reject it (in whole or in part) according to the standards in § 252 of the 1996 Act--to determine if it discriminates

against a carrier not a party to the agreement or is inconsistent with the public interest, convenience and necessity. The Commission can reject portions of the agreement, but it cannot require additional provisions. If the Commission does not act within 90 days to approve or reject the Agreement, the Agreement will go into effect as is on August 4, 1998, and be deemed approved.

6. The Commission finds that the terms in the parties' Agreement appear to conform to the standards required by the 1996 Act, with the exception of the contract provisions described and rejected below. This Agreement raises certain concerns as described below.

The Commission rejects the following provisions:

7. Ordering and Maintenance - This Agreement contains a provision that would restrict customer changes in providers should their accounts be "in arrears"--a clause which this Commission rejected in agreements for resale of services between U S WEST and other providers. Section 11.3.2 on page 70 states:

> . . . The parties agree that they will not transfer to each other their respective end users whose accounts are in arrears. The Parties further agree that they will work cooperatively together to develop the standards and processes applicable to the transfer of such accounts.

We have previously expressed our concerns for customer privacy and increased opportunity for anticompetitive conduct concerning this identical provision. Similarly, in the Sprint/U S WEST agreement, although the rejected language was much different and concerned a credit worthiness database the parties intended to develop, we stated that the rejected provision raised concerns for customer privacy.

8. In Docket Nos. D96.11.191 and D96.11.198,[1] the Commission requested that the parties respond to its concern that this identical clause is not consistent with the public interest, convenience and necessity as required by 47 U.S.C. § 252(e)(2)(A)(ii). The Commission indicated its concern that the customer's ability to change local exchange providers may be improperly and unreasonably restricted by this contract term, noting that there is no explanation of what is meant by "in arrears," there may be impermissible privacy violations resulting from this term, and that it might be an anticompetitive or an unfair trade practice. The following paragraphs 12-18 are excerpted from Order No. Order No. 5962a:

> 12. Citizens and U S WEST filed a joint response to the Commission's request, stating their belief that the language is a necessary part of their agreement, attempting to address potential problems with unscrupulous customers who switch providers to avoid having to pay the existing provider's bill. They further stated:
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> > Once a customer switches providers, it will be very difficult for the old provider to collect the unpaid bill. Additionally, a customer leaving behind an unpaid bill is a very high risk customer for the new provider. The parties have not yet been able to design an optimal system which will prevent abuses by the customer while minimizing the amount of actual credit information that is exchanged. That is why the second sentence of the language . . . requires the parties to continue working together to

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[1] **In the Matter of the Application of Citizens Telecommunications Company Pursuant to Section 252(e) of the Telecommunications Act of 1996 for Approval of its Resale Agreement With U S WEST Communications, Inc., Docket No. D96.11.191; and In the Matter of the Application of Montana Communications Pursuant to Section 252(e) of the Telecommunications Act of 1996 for Approval of its Resale Agreement With U S WEST Communications, Inc., Docket No. D96.11.198, Order No. 5962a (Feb. 10, 1997).**

> develop standards and processes applicable to the transfer of such accounts. As a reasonable interim measure, the parties agree that the current provider will not transfer a customer if that customer is in arrears. For example, if USWC refuses to transfer a customer to CTC, CTC will know that the customer needs to resolve a bill in arrears, without knowing any of the details of the customer's credit history. In the case of both USWC and CTC, arrears means the customer is in the late stages of a progressive effort to collect on a bad debt.

U S WEST and Citizens contend that the provision promotes the public interest by enabling carriers some means to protect their ability to collect bad debt, thereby preserving the financial health of the parties and keeping rates low for all subscribers by reducing the cost of unpaid debt which ultimately would have to be absorbed by them. They state that it also provides a means to discourage bad faith actions of customers who switch carriers to avoid payment.

13. [Montana Communications] owner, David Wick, also responded to the Commission's request, stating that the transfer of information relating to customers whose accounts are in arrears is a positive approach to addressing fraud in the competitive market. Mr. Wick stated that, "This is not for the exclusion of any individual requesting service, but rather to help in determining deposit amounts and duration of holding deposits." Mr. Wick echoed some of the same concerns as U S WEST and Citizens, noting that there is a higher potential for the consumer to abuse the system in the competitive environment. Although this relates to only a small percent of the consumer base, according to Mr. Wick, resale margins are so small to start with and the exchange of basic information is only a means for managing potential losses.

14. The Commission is sympathetic to the concerns expressed by the parties and recognizes that the competitive local exchange market will likely create opportunities for customers to obtain services from alternate providers even though they may have delinquent accounts with a competitor. This will be a change for the incumbent LEC which has been the only provider of telecommunications service in the past and which still has near total market power, particularly in rural states like Montana. Its credit records will not be complete and it may have to develop new methods to screen new customers. Still, the incumbent LEC will have the benefit of its database records in the case of a reseller to show that service has been recently disconnected at a particular address and this may assist it somewhat in preventing unscrupulous actions by consumers. In the short term, its existing credit records should be reliable and useful for this purpose.

15. In Montana, regulated telecommunications providers such as U S WEST must provide service to all customers if they meet certain conditions set forth in Commission regulations. In certain instances, U S WEST may request and obtain advance payments, deposits, or other credit guarantees. Resellers are not subject to these credit regulations and they may take steps they deem necessary to prevent uncollectible accounts. As an example, resellers may rely on consumer credit reporting agencies, while the regulated incumbent may not use such reports for serving its residential customers. [[2]]

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[2]Paragraph 15 from the Citizens/Montana Communications order is affected by the passage of Senate Bill 89 by the 1997 Montana Legislature. Resellers are now regulated

16. The Commission expressed its concern for consumer privacy. Sharing credit information without the knowledge and consent of the customer involved violates the customer's reasonable expectations of privacy and should not be permitted unless there is a compelling reason for such an invasion. The parties have not demonstrated that such a compelling reason exists and that other means of limiting potential losses are unreasonable, or that they may be substantially harmed if they are not permitted to exchange consumer information between them. The Commission further notes that telecommunications providers in the long distance segment of the industry have not been able to engage in the sort of exchange of information which may be permissible under the above-quoted provision. The privacy rights of consumers and their ability to choose a supplier of telecommunications services may not be trumped by the parties' concerns for uncollectible accounts.

17. The proposed term would also increase the opportunity for engaging in anticompetitive activity. Specifically, an account that is "in arrears" may be a valued customer who routinely pays bills a little late and has been permitted to do so by the provider. Although the parties stated in their response that this means that a customer is in the last stages of a progressive effort to collect on a bad debt, that is not what it says, and in interpreting contract terms, the plain meaning of words used generally prevails. Webster's Ninth New Collegiate Dictionary (1988) defines arrears as "the state of being behind in the discharge of obligations." The Commission finds this term vague and overbroad, with the potential of unreasonably restricting consumer choice as the competitive market develops. Thus, it is not in the public interest.

18. A further concern is the incumbent LEC's obligation as a carrier of last resort. The incumbent LEC may be required to provide service according to the Commission's regulations, notwithstanding the existence of an account in arrears with another carrier. *See* ARM 38.5.1101, *et seq*. Section 252(e)(3) of the 1996 Act clearly permits the Commission to require regulated incumbents to provide service to residential consumers, notwithstanding other credit problems the consumer may have. See ARM 38.5.1104.

9. The provision restricting transfers of customers whose accounts are "in arrears" has not been approved in subsequent agreements and the Commission has not otherwise indicated that it will approve such terms. U S WEST, although fully aware that this and other provisions have been rejected in prior Commission orders approving interconnection agreements, continues to insert such provisions in new negotiations. Nonetheless, U S WEST has included

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and must comply with Commission regulations.

"Account balance is in Pay Treatment status" as a reason for rejecting a CLEC order request in its "Interconnect & Resale Resource Guide" which it provides to CLECs for ordering resale services and unbundled network elements--with no indication that it does not apply in Montana. *See* In the Matter of the Commission's Investigation into U S WEST Communications, Inc.'s Compliance with Section 271 of the 1996 Act, Docket No. D97.5.87, Prefiled Testimony of Lynn Notarianni, Attachment 1. Again, the Commission rejects Section 11.3.2 of the Agreement because it is not consistent with the public interest as discussed in the above-quoted excerpt from Order No. 5962a.

10. Customer Authorization: Section 11.3.4 on pp. 70-71 concerns the unauthorized switching of providers, more commonly known as "slamming." It provides, in pertinent part:

> Prior to placing orders on behalf of the end user, Touch America shall be responsible for obtaining and have in its possession Proof of Authorization ("POA"). *POA shall consist of documentation acceptable to USWC* of the end user's selection of Touch America. Such selection may be obtained in the following ways:
> . . .
> 11.3.4.4 *A prepaid returnable postcard supplied by Touch America which has been signed and returned by end user. Touch America will wait fourteen (14) days after mailing the postcard before placing an order to change.* (Emphasis added.)

The Commission rejects Section 11.3.4 in its entirety because it does not comply with Montana law and Commission rules on slamming. In prior proceedings for approval of interconnection agreements, the Commission has permitted the parties to amend their agreements to conform to Montana law and Commission rules. However, such an amendment is unnecessary as the change in provider is controlled by § 69-3-1303, MCA, and ARM 38.5.3801 and 38.5.3802. It is irrelevant that the authorization is in a form that is acceptable to U S WEST if it does not comply

with Montana law. Moreover, if the authorization is consistent with Montana law, U S WEST may not reject it.

11. Construction - Section 11.5.7 of the Agreement (p. 75) states:

> Resold services are available where facilities currently exist and are capable of providing such services without construction of additional facilities or enhancement of existing facilities. However, if Touch America requests that facilities be constructed or enhanced to provide resold services, USWC will review such requests on a case-by-case basis and determine, in its sole discretion, if it is economically feasible for USWC to build or enhance facilities. If USWC decides to build or enhance the requested facilities, USWC will develop and provide to Touch America a price quote for the construction. If the quote is accepted, Touch America will be billed the quoted price and construction will commence after receipt of payment.

The Commission finds that this provision could conflict with the public interest and should be rejected because circumstances may arise where U S WEST, pursuant to its duties as a carrier of last resort, is required by law to construct facilities. This is another section which appears repeatedly in interconnection agreements presented to the Commission for approval, after the Commission has rejected it.

12. Payment - Section 11.10.5 provides that if Touch America fails to make full payment for resold services provided under the Agreement within 60 days of the due date on Touch America's bill, U S WEST may "disconnect for the failure by Touch America to make full payment." If Touch America does not pay U S WEST pursuant to the terms of 11.10, Touch America's end user customers' services could be in jeopardy of being disconnected through no fault of their own.

13. The Commission has stated over and over again in proceedings pursuant to § 252(e) of the 1996 Act, that a section such as this is not in the public interest because it contains no provision for providing notification to the Commission of a pending disconnection of service to an indeterminable number of end users. U S WEST must follow certain Commission rules prior to terminating service to its own end users--as must Touch America. If notified of a pending termination of service to Touch America's customers, the Commission can act appropriately. It is not consistent with the public interest to permit U S WEST to terminate service to Touch America's end users with no notification to the Commission. The Commission rejects § 11.10.5 of the parties' Agreement. The parties may amend this section of the Agreement to include a provision that allows for reasonable notice to the Commission that will afford the Commission time in which to take any appropriate action to protect end users. As we have stated in recent orders, it is not sufficient that U S WEST agrees to not disconnect service to end users, as that practice could constitute "slamming."

14. Dispute Resolution - Section 27.17 beginning on page 100 sets forth the parties' agreement pertaining to resolution of disputes arising under the Agreement. It provides that such disputes may be brought to the Commission through its informal or formal complaint processes or may be referred to negotiation and arbitration under the procedures provided in the Agreement. It includes detailed and extensive arbitration provisions. While the parties are free to provide for dispute resolution in this manner according to the 1996 Act, the resolution arrived at by the arbitrator may not be consistent with the public interest, convenience and necessity. As it has done on numerous prior occasions, the Commission concludes that this contract provision should be rejected because it does not provide for notification to the Commission of issues to be

arbitrated or of the subsequent decision reached by the arbitrator. The public interest and the facilitation of market entry is better served by such notification. The parties may amend this section of the Agreement to provide for adequate Commission notification.

15. Regulatory Approval - The first sentence in § 26.30 on page 103 states: "The Parties understand and agree that this Agreement will be filed with the Commission and may thereafter be filed with the FCC and shall, at all times, be subject to review by the Commission or the FCC." (Emphasis added.) The 1996 Act provides for review by state commissions only. *See* 47 U.S.C. § 252. Although the FCC concocted an interpretation of the Act by which it intended to establish a federal review process under its § 208 complaint process, this interpretation was invalidated by the Court in Iowa Utils. Bd., et al. v. FCC, 120 F.3d 793 (8th Cir., 1997), *amended on reh'g,* 135 F.3d 535 (Oct. 14, 1997), *cert. granted, sub nom.* AT&T Corp. v. Iowa Utils. Bd., 118 S.Ct. 683 (1998). These are intrastate telecommunications matters under the exclusive review of state commissions. Id., at 804. As such, the inclusion of the FCC is not appropriate and, therefore, the Commission rejects this provision.

16. In Order No. 6067 dated May 18, 1998, the Commission noted that it had consistently rejected--*in seven prior proceedings*--four sections related to construction, ordering and maintenance, payment and dispute resolution. It further noted U S WEST's failure to discontinue using the provisions in resale agreements after being repeatedly rejected by the Commission, and after the Commission *twice* had ordered U S WEST to cease using verbatim language from the consistently-rejected portions of agreements. The Commission further noted that U S WEST had also proposed amendments related to the provisions which also had been repeatedly rejected. The Commission's order in that proceeding states that "U S WEST's

continued failure to conform its resale agreements to prior Commission decisions will not be treated lightly by the Commission, and may result in orders disallowing amendments with respect to rejected contract terms or other appropriate sanction." Although U S WEST did not have the benefit of Order No. 6067 prior to the filing of this document, a March 20, 1998 Order in D98.1.15 provided:

> . . . U S WEST's persistence in using these terms despite their continued rejection creates additional work for the Commission, its staff, and the parties to the agreements. Once a contract provision is rejected and the reasons for the rejection are explained, the provision should not be included in future agreements. This will lessen the need for further amendments to the agreements and will expedite resellers' market entry.

17. In this Agreement, §§ 11.3.2, 11.3.4.4, 11.5.7, 26.17, and 26.30 are identical to sections which have been rejected by the Commission. Section 11.10.5, although not identical, contains no provision for notification to the Commission; the Commission has repeatedly rejected such provisions for Payment when this is not included. Because the Agreement was filed with the Commission prior to the date the Commission issued Order No. 6067, we are taking no action pursuant to these statements in this proceeding and approve the Agreement as discussed above.

18. A number of sections in the parties' Agreement provide for the subsequent negotiation and executions of agreements for matters which have not been included in this Agreement. They include § 9.3.2.5 (additional parameters by which the parties will utilize the 911 or E-911 database will be the subject of further discussion between them); § 9.7.9 (specific provisions regarding Operator Services will be addressed in a separate agreement between the parties); § 9.8.4 (stating that pricing for LIDB shall be determined on a case-by-case basis and

will be included in a separate LIDB agreement between the parties); § 9.10 (stating that miscellaneous ancillary services will be addressed in separate agreements between the parties, including, but not limited to, 800 and CMDS); § 21.1 (stating that access to specific services of one party should be made available to the other party upon execution of an agreement defining terms for billing and compensation of such calls); and § 22.4 (stating that the parties agree to negotiate and execute an agreement for settlement of non-ICS revenue). This is not meant to be an exhaustive list of all sections in the Agreement which provide for additional negotiation and execution of agreements for specific matters. It is included here to illustrate that there are numerous items which may not have been resolved by negotiations and/or included in the Agreement that was filed, but which may become part of the Agreement in future. It is important that the parties understand that such additional agreements constitute amendments to this Agreement, and, as such, must be filed with the Commission for approval.

III. Conclusions of Law

1. The Commission has authority to supervise, regulate and control public utilities. Section 69-3-102, MCA. U S WEST is a public utility offering regulated telecommunications services in the State of Montana. Section 69-3-101, MCA. Touch America is a provider of regulated interexchange telecommunications services in the State of Montana, and will also be regulated when it begins offering local exchange service in Montana as a competitive local exchange carrier.

2. The Commission has authority to do all things necessary and convenient in the exercise of the powers granted to it by the Montana Legislature and to regulate the mode and

manner of all investigations and hearings of public utilities and other parties before it. Section 69-3-103, MCA.

3. The Commission has jurisdiction to approve the Interconnection Agreement negotiated by the parties and submitted to the Commission for approval according to Section 252(e)(2)(A). Section 69-3-103, MCA.

4. The United States Congress enacted the Telecommunications Act of 1996 to encourage competition in the telecommunications industry. Congress gave responsibility for much of the implementation of the 1996 Act to the states, to be handled by the state agency with regulatory control over telecommunications carriers. See generally, the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (amending scattered sections of the Communications Act of 1934, 47 U.S.C. § 151, et seq.). The Montana Public Service Commission is the state agency charged with regulating telecommunications carriers in Montana and properly exercises jurisdiction in this Docket pursuant to Title 69, Chapter 3, MCA.

5. Adequate public notice and an opportunity to be heard has been provided to all interested parties in this Docket, as required by the Montana Administrative Procedure Act, Title 2, Chapter 4, MCA.

6. Approval of interconnection agreements by the Commission is subject to the requirements of federal law as set forth in 47 U.S.C. § 252. Section 252(e) limits the Commission's review of a negotiated agreement to the standards set forth therein for rejection of such agreements. Section 252(e)(4) requires the Commission to approve or reject the U S WEST/ Touch America Agreement by August 4, 1998, or the Agreement will be deemed approved.

IV. Order

THEREFORE, based upon the foregoing, it is ORDERED that the interconnection Agreement between U S WEST Communications, Inc. and Touch America is approved as discussed herein, subject to the following conditions:

1. The parties may file an amendment to the Agreement without delay consistent with the Commission's decision in this proceeding.

2. The parties shall file subsequent amendments to their Agreement with the Commission for approval pursuant to the 1996 Act. The agreements to be negotiated and executed separately as provided in this Agreement shall be filed as amendments to this Agreement.

DONE AND DATED this 23rd day of June, 1998, by a vote of 4-0.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

_____
DAVE FISHER, Chairman

_____
BOB ANDERSON, Commissioner

_____
DANNY OBERG, Commissioner

_____
BOB ROWE, Commissioner

ATTEST:

Kathlene M. Anderson
Commission Secretary

(SEAL)

NOTE: Any interested party may request the Commission to reconsider this decision. A motion to reconsider must be filed within ten (10) days. See ARM 38.2.4806.